TABLE OF CONTENTS.

Journal Entry of the Court of Common Pleas, May 24, 1965 ..... 1a

Journal Entry of the Court of Common Pleas, June 22, 1965 ..... 2a

Supplemental Journal Entry of the Court of Common Pleas, July 29, 1965 ..... 4a

Opinion of the Court of Common Pleas, March 5, 1965 ..... 5a

Opinion of the Court of Common Pleas, May 12, 1965 ..... 29a

Oral Opinion of the Court of Common Pleas, July 22, 1965 ..... 37a

Court of Appeals' Memorandum to Lawyers, Dated April 25, 1967 ..... 41a

Journal Entry of the Court of Appeals, Filed May 24, 1967 ..... 47a

Order of the Supreme Court of Ohio Overruling Motion For an Order Directing the Court of Appeals For Cuyahoga County to Certify Its Record, Nov. 1, 1967 ..... 48a

Order of the Supreme Court of Ohio Dismissing Appeal From the Court of Appeals For Cuyahoga County, Nov. 1, 1967 ..... 48a

Mandate of the Supreme Court of Ohio, Nov. 1, 1967 48a

Order of the Supreme Court of Ohio Denying Rehearing, Nov. 29, 1967 ..... 49a

Order of the United States Supreme Court Extending Time For Docketing, Feb. 27, 1968 ..... 49a

Constitution and Statutes:

Amendment [XIV] of the United States Constitution ---------- 49a

28 U. S. C. 1257. State courts; appeal; certiorari 50a

Act of June 19, 1936, Chap. 592, 49 Stat. 1526; 15 U. S. Code, Secs. 13, 13a, 13b, 21a ---------- 50a

O. R. C. § 1333.27 Purpose and policy ---------- 52a

O. R. C. § 1333.28 Definitions ---------- 54a

O. R. C. § 1333.29 Contracts or notices establishing minimum resale prices ---------- 55a

O. R. C. § 1333.30 Evidence of notice ---------- 57a

O. R. C. § 1333.31 Retention of proprietary interests ---------- 58a

O. R. C. § 1333.32 Unfair competition; remedies ---------- 58a

O. R. C. § 1333.33 Exceptions ---------- 59a

O. R. C. § 1333.34 Exempt agreements ---------- 60a

APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(May 24, 1965.)

This cause came on for trial before the Court and was heard upon the pleadings, the evidence, and the arguments of counsel.

Upon consideration, the Court finds, as prayed in the amended petition, upon the whole record, and subject to the conditions herein set forth, the plaintiff is entitled to injunctive relief.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant, its officers, directors, servants, agents, associates, employees, sales force and any and all persons while acting under or in aid of the defendant are hereby permanently enjoined from selling, offering for sale or advertising for sale any products manufactured by plaintiff and bearing plaintiff's trademarks, brands, names or labels, including without limitation the trademarks "Rubbermaid," "Means Better Made," "Safti-Grip," and "Shelf Cushion" at prices less than the minimum retail resale prices now or hereafter established by plaintiff pursuant to its fair trade contracts in the state of Ohio; provided, however, it is a condition to the continued effectiveness of this order that with respect to any revision or change hereafter made in the price of any Rubbermaid fair traded product, whether made in connection with a special sale or otherwise, plaintiff shall have given direct written notice thereof to each Ohio retailer who has executed a Rubbermaid Authorized Fair Trade Agreement.

2. So long as plaintiff continues to sell under any of its trademarks as a non-fair trade item its bathtub mat

Item 0450, or any non-fair traded item similar thereto, there shall be excepted from the operation of the within injunction the plaintiff's Safti-Grip Bathtub Mat, Item DO-7038.

3. This injunction shall become effective thirty (30) days from the date of this Journal Entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

4. Plaintiff shall recover from defendant its costs incurred herein, for which judgment is rendered; but plaintiff's attorneys fees shall not be taxed as part of the costs.

Plaintiff and defendant except.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(June 22, 1965.)

This matter came on before the Court upon the application of the plaintiff for a postponement in the effective date of the injunction issued by this Court to become effective thirty (30) days after May 24, 1965, the date of the Journal Entry. In said Journal Entry the third paragraph provided as follows:

> 3. This injunction shall become effective thirty (30) days from the date of this Journal Entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on

Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

This Court is informed and finds that the plaintiff, on May 25, 1965, filed a petition in this Court "against the May Company seeking an injunction against the practice of the May Company of giving double stamps on cash sales of Rubbermaid's fair-traded products on Tuesday."

The Court is further informed and finds that the defendant May Company thereafter remove said action to the United States District Court for the Northern District of Ohio; and that said action is set for trial on the merits on July 12, 1965, before the Honorable James C. Connell, Chief Judge.

Upon the foregoing findings and for good cause shown plaintiff's application for postponement of the effective date of this Court's injunction is granted.

IT IS ORDERED that said injunction, as provided for in the Journal Entry of May 24, 1965, shall become effective July 30, 1965, unless at a hearing to be held, if necessary, on July 26, 1965, the defendant Claber-Distributing Company of Cleveland, Inc., establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

Except to the extent that the present Journal Entry modifies the effective date of the injunction provided for in the Journal Entry of May 24, 1965, said previous Journal Entry is otherwise reaffirmed and continued in effect.

IT IS SO ORDERED.

SUPPLEMENTAL JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(July 29, 1965.)

This matter came on for hearing on July 22nd, 1965 pursuant to paragraph three of this Court's Journal Entry of May 24th, 1965, as amended June 22nd, 1965, and upon the plaintiff's motion to cancel the conditions contained in said paragraph three and to make the injunction absolute and effective, and upon the evidence and arguments of counsel.

The Court finds and determines that plaintiff having requested that the Court file separate findings of fact and conclusions of law, the Court's written opinions of March 5th, 1965 and May 12th, 1965, and its oral opinion of July 22nd, 1965, constitute its findings of fact and conclusions of law.

And the Court further finds and determines that as of July 22nd, 1965, the practice of The May Company at its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products continues with plaintiff's consent and acquiescence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The findings of fact and conclusions of law contained in the aforementioned opinions are reaffirmed; and said opinions shall be filed as the Court's findings of fact and conclusions of law.

2. Plaintiff's motion, described above, is denied.

3. The injunction referred to in the Court's Journal Entry of May 24, 1965 shall not become effective and is cancelled and denied.

4. Each party shall pay its own costs.

5. Full right of appeal is granted to both parties. Plaintiff and defendant except.

OPINION OF THE COURT OF COMMON PLEAS.

(March 5, 1965.)

WILLIAM K. THOMAS, J.:

Plaintiff, Rubbermaid, Incorporated of Wooster, Ohio, seeks a permanent injunction and damages against Claber Distributing Co. of Cleveland, Ohio, Inc., which owns and operates seven Uncle Bill's stores, all located in Cuyahoga County. Hereafter the plaintiff is called Rubbermaid, and the defendant is called Uncle Bill's.

Trade-marked "RUBBERMAID," rubber, wire, and plastic houseware products are manufactured by the plaintiff. Extensively advertised under the trade name "RUBBERMAID" these housewares are sold and distributed in Ohio and throughout the United States. Rubbermaid's houseware products, with a few exceptions, bear minimum retail prices which Rubbermaid stipulates and notices under the 1959 Ohio Fair Trade Act, R. C. 1333.27-34.

Uncle Bill's characterizes its seven retail stores as discount department stores. Uncle Bill's admits actual notice of Rubbermaid's fair trade agreements with Ohio retailers of Rubbermaid's houseware products; and Rubbermaid's establishment of minimum retail resale prices for certain of these products. Uncle Bill's further admits that it has acquired and subsequently offered for sale and sold certain Rubbermaid houseware products at prices below the minimum retail resale prices designated by Rubbermaid. It is Uncle Bill's continued sale of Rubbermaid's housewares below fair-traded prices which Rubbermaid seeks to permanently enjoin. By agreement plaintiff's

claim for damages is reserved for hearing after the Court rules on the request for injunctive relief.

Uncle Bill's challenges the constitutionality of the 1959 Fair Trade Act, and asserts certain affirmative defenses.

At the conclusion of plaintiff counsel's opening statement, defendant's counsel, renewing a ground first raised by demurrer, moved for judgment. He concedes that the 1959 Fair Trade Act was declared constitutional by the Cuyahoga County Court of Appeals in *Hudson Distributors, Inc. v. Upjohn Co.*, 117 Ohio App. 207. But he points out that the affirmance of *Hudson* by the Ohio Supreme Court (174 Ohio St. 487) was by a 3 to 4 vote. Section 2 of Article IV of the Ohio Constitution says that—

> No law shall be held unconstitutional * * * without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.

Moreover he argues that *Hudson's* subsequent affirmance by the United States Supreme Court, 377 U. S. 386, 12 L. Ed. 2d 419, 84 Sup. Ct. 1561, merely determined that the Federal McGuire Act exempted the 1959 Ohio Fair Trade Act from the Federal Anti-Trust laws. In short, he argues that *Hudson* is only the law of that case.

Determining that *Hudson*, a decision of the Cuyahoga County Court of Appeals, is clearly binding on this Court the motion was overruled. That ruling is reaffirmed.

As related to the elements which plaintiff must prove to warrant injunctive relief under the 1959 Fair Trade Act the evidence supports and directs the following findings.

Rubbermaid manufactures principally a housewares line of products, though it also makes commercial and industrial type products such as rubber and vinyl throw mats for automobiles. Typical housewares for the kitchen

are drainboard mats, dishpans, dish drainers; for the bathroom typical items are bathtub mats, and toilet top trays; and for general house use there are wastebaskets, storage bins and cabinets, and floor mats. Rubbermaid's entire line of houseware items numbers about 100. In addition many of these items are produced in different colors. As a manufacturer the plaintiff is a "producer" under R. C. 1333.28.

Quality Housewares is the caption of its 1965 Catalog-Price List. Voiced most positively by defendant's Vice-President, the evidence reveals that plaintiff's products fully measure up to the quality claim. Registered as separate trade-marks with the U. S. Patent Office are a red panel shape, the included name "Rubbermaid" and the words "Means Better Made," which usually appear in the red panel immediately below the name "Rubbermaid." Patented with the U. S. Patent Office under Patent No. 191,901 are "Safti-Grip" bathtub and shower mats. The plaintiff qualifies under R. C. 1333.28 as a "proprietor," "who identifies a commodity produced by him by the use of his trade-mark."

Throughout the country there are a number of companies which manufacture rubber, plastic, and wire houseware products of the same type and class as plaintiff's houseware products. A list of 21 major competitors of Rubbermaid houseware products is in evidence. It is determined that, as required by R. C. 1333.29, Rubbermaid houseware products are "in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area."

It has long been Rubbermaid's policy to fair trade its houseware products. In states permitting fair trade minimum resale prices, executed agreements with retailers

who handle Rubbermaid products are required. This was true in Ohio under the 1936 Fair Trade Act declared unconstitutional in *Union Carbide & Carbon Co. v. Bargain Fair, Inc.*, 167 Ohio St. 182 (1958). In 1962, since the passage of the new Act in 1959, new agreements have been prepared by Rubbermaid. Over 1100 retailers in Ohio have signed these, and in Cuyahoga County some 150 retailers have entered Rubbermaid written agreements. The "Rubbermaid Authorized Retailer Fair Trade Agreement," in part, provides:

> 2. Rubbermaid products now or hereafter made subject to this agreement are and will be distributed under Rubbermaid's trademark, brand or name in free and open competition with commodities of the same general class produced or distributed by others.
>
> 3. Retailer agrees (except as specifically permitted by statute) not to advertise, offer for sale, or sell the products listed in Schedule A hereto attached or in said Schedule A as it may from time to time be amended at less than the minimum retail selling price stipulated on such Schedule for such a sale.

Uncle Bill's declines to sign an agreement with Rubbermaid. But it acknowledges receipt of written notices of Rubbermaid's fair trade agreements "establishing minimum Fair Trade retail prices on all 'Rubbermaid' trademarked housewares advertised or sold in Ohio."

Defendant Uncle Bill's has sold and is selling fair traded Rubbermaid Housewares below the stipulated minimum retail selling price. Experiencing difficulty in obtaining sources of supply, it frankly states it would sell more Rubbermaid products if available. It clearly regards Rubbermaid Housewares as quality merchandise that it desires to sell. Unless enjoined it is manifest that Uncle Bill's will continue to sell fair traded Rubbermaid Housewares below minimum resale retail prices.

The next essential element of the plaintiff's case arises under the proviso supplied by the second sentence of R. C. 1333.29. It reads:

> Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory.

Does the evidence show that Rubbermaid's minimum resale prices, differentiated as to various levels of distribution, are not otherwise unlawfully discriminatory? The language of the proviso must first be interpreted.

This proviso can hardly refer to any particular statutory prohibition against discriminatory prices. The Valentine Act (Anti-Trust) (R. C. 1331.01-99) is not applicable, nor is there any other Ohio statute which is. Moreover the Federal Robinson-Patman Act, 15 U. S. C. 13a, even if otherwise applicable, may only be enforced by one of its specified and self-contained remedies, *Bruce's Juices v. American Can Co.*, 330 U. S. 743; *Carter Products, Inc. v. Riteprice Merchandise, Inc.*, 23 Misc. 2d (N. Y.) 230.

This proviso is construed to mean that within (as distinguished from between) each level of distribution of the proprietor's products (i.e., retailer or wholesaler) the minimum resale prices must not be unlawfully discriminatory. Stated affirmatively, it is discriminatory minimum resale prices within the same level of distribution which is unlawful. There is no evidence that Rubbermaid is setting different minimum retail resale prices for different retailers. Nor is it claimed that this is happening.

R. C. 1333.32(B) provides:

> (B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> * * *

> (2) Obtain injunctive relief whether or not specific monetary damages are established; * * *.

Under this language no proof of monetary damages is necessary to establish irreparable injury, as a prerequisite to injunctive relief. Moreover by earlier language of R. C. 1333.32 it is an act of unfair competition for a distributor with notice of fair traded prices to sell below those prices. Non-compliance with the stipulated minimum retail resale prices irreparably injures the proprietor's minimum resale price maintenance program. Under the Act this is sufficient proof of irreparable injury.

The essentials of its case being satisfied, plaintiff establishes its right to permanent injunctive relief, unless the defendant has proved an affirmative defense which defeats plaintiff's right to relief. "While the Fair Trade Act does not make provision therefor, the Courts have engrafted equitable defenses on the right of manufacturers to enforce the Fair Trade Act," *The Lionel Corporation v. Phil Klein* (Delaware Court of Chancery), 114 A. 2d 652.

Considering defendant's affirmative defenses in the order in which they appear, the defendant first claims:

> *, * * plaintiff has failed to enforce diligently or fairly its alleged agreements, written, or otherwise, with its distributors or other retailers, as to minimum resale prices.

The evidence indicates that with the exception of Uncle Bill's, and the Ontario Stores (like Uncle Bill's, a subsidiary of Cook Coffee Company), other retailers in Ohio are complying with Rubbermaid's minimum retail resale prices. The evidence concerning Ontario Stores is incomplete. From the evidence in the record it appears that Ontario Stores is a discount merchandiser comparable to Uncle Bill's, with stores in Cincinnati, Columbus, and

perhaps elsewhere in Ohio. Legal efforts to enjoin Ontario Stores from selling below fair trade prices have failed in Columbus, *Bulova Watch Co. v. Ontario Stores*, 86 Ohio L. Abs. 585, 18 Ohio Ops. 2d 221, and apparently, recently, also in Cincinnati.

Any refusal of courts in Franklin County and Hamilton County to enjoin Ontario Stores from selling Rubbermaid products below fair trade prices does not prove Rubbermaid is less than diligent in pursuing legal remedies to enforce its established program of minimum retail resale prices. What it does prove is lack of statewide uniformity in judicial determination of the constitutionality of the 1959 Fair Trade Act due primarily to Section 2 of Article IV of the Ohio Constitution (language, *supra*).

Further charging lack of diligent enforcement of its minimum price maintenance program the defendant claims that Rubbermaid is acquiescing in the practice of The May Company, a direct retailer of Rubbermaid, in giving Double Eagle Stamps on each Tuesday. This practice, it is said, grants a price concession greater than the three percent limitation of R. C. 1333.32.

Plaintiff admits knowledge of the practice but insists that the practice does not violate R. C. 1333.32.

The May Company gives Eagle Stamps with the purchase of merchandise at its stores in Cuyahoga County. One Eagle Stamp is given for each ten cents of the purchase price (before taxes), figured to the lower even dime. Stamps are given on credit purchases conditioned on payment being made by the customer within fifteen days after the date of mailing the customer's statement. By inference, cash purchases on days other than Tuesday likewise entitle the purchaser to Eagle Stamps on the same basis.

On Tuesdays only, when a purchase is made and paid

for in cash (including check) at the time of purchase, two Eagle Stamps are given on each ten cents of purchase price computed as above stipulated. If the purchase on Tuesday is for credit, one stamp only is given upon payment within fifteen days, as in the case of all types of purchases on days other than Tuesdays.

To be redeemable all Eagle Stamps must be pasted in a stamp book provided by the Company. A full book consists of 1380 stamps, having a coupon value of $3.00. On the basis of a $3.00 coupon representing $138 in purchased merchandise the discount may be computed at 2.17 percent. A book filled with double stamps represents a discount of 4.34 percent.

These computations roughly conform to refund deductions. On merchandise returned for refund without the stamps when stamps have been given at the rate of one stamp for each ten-cent purchase, The May Company deducts two and one-half percent of the purchase price from the amount to be refunded. But where two stamps have been given for each ten cents of the purchase price on Tuesdays, on return of the merchandise without the stamps five percent is deducted from the purchase price.

Assuming that R. C. 1333.32 applies to Double Stamps on Tuesdays these stamps are identical to single stamps in character as well as value. Therefore whenever May Company gives Double Eagle Stamps on a fair-traded Rubbermaid Housewares product the purchaser is receiving a price concession in excess of the maximum three percent allowed by R. C. 1333.32. This assumption the plaintiff vigorously disputes.

Plaintiff urges that the second stamp is different from the first. It contends that the first stamp is a credit transaction stamp; and this is authorized by R. C. 1333.32. It

argues that the second stamp, given on cash purchases on Tuesday, is a cash discount not subject to any limitation of R. C. 1333.32. Rubbermaid's Fair Trade Agreement authorizes the second stamp, it is said, in these terms:

> Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three percent (3%) of the minimum retail selling price only under the following terms and conditions:
>
> 1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.

In actual fact The May Company does not distinguish the first from the second of the double stamps. Thus the single stamp is not given only in credit transactions. On days other than Tuesdays the so-called single stamp is given for cash purchases, as well as on credit purchases. Moreover the May Company advertising always refers to DOUBLE EAGLE STAMPS ON TUESDAY. It never differentiates the second Tuesday stamp. Also only one type of stamp redemption book is provided. In this book are pasted, indiscriminately, second stamps as well as single stamps. Everything considered the single stamp, among other things a discount for prompt payment of bills, is held to be a price concession or cash discount. So is the second of the double stamps.

Examination of R. C. 1333.32 makes it evident that Rubbermaid and The May Company cannot by private agreement create a trading stamp that is immune from R. C. 1333.32. By its plain terms, R. C. 1333.32 embraces all price concessions, and trading stamps. It specifies that in determining whether the sale of a commodity is below the proprietor's stipulated minimum resale price "any concession made, whether by the giving of coupons or otherwise" shall be deducted from the price. Only the

succeeding proviso legalizes trading stamps. R. C. 1333.32's proviso permits:

> * * * the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three percent of such stipulated minimum resale price, * * *.

This proviso embraces all trading stamps, irrespective of their purpose. It leaves no room for any type of price concession stamp to operate outside of its three percent limitation. Old as is the May Company's sixty-year practice of giving Double Eagle Stamps on Tuesdays its venerability does not put the custom beyond the reach of the plain and positive three percent trading stamp limitation of R. C. 1333.32.

Plaintiff's counsel suggest that it may be difficult to enforce an end to May's practice of giving Double Eagle Stamps on Tuesday on the cash purchase of Rubbermaid fair traded products. Nothing in the record suggests that The May Company will not conform to the three percent trading stamp limitation, now that its applicability to Double Eagle Stamps on Tuesday has been judicially determined. The evidence does reveal that Rubbermaid has a built-in enforcement means at its disposal. Presumably, Rubbermaid's control over its retail representatives at May's is sufficient to enforce the ban against Double Eagle Stamps on Tuesday. Rubbermaid's retail representatives, who principally sell Rubbermaid's products, can themselves refuse to give the extra stamps. Other means of enforcement as well are at Rubbermaid's disposal.

Defendant proves Rubbermaid's lack of diligent enforcement of its minimum price maintenance program, in knowingly permitting May's Double Eagle Stamps on Tuesday to be given on Rubbermaid cash purchases.

As long as The May Company, a dominant retailer in Greater Cleveland and in the State, continues to violate the 1959 Fair Trade Act, with Rubbermaid's consent or acquiescence, the plaintiff is not entitled to the injuction it seeks against the defendant's breach of the same Act. To hold otherwise would offend Equity's most honored maxim, that he who seeks equity must do equity. The order hereafter constructed is accordingly designed.

In its next affirmative defense the defendant contends,

> that plaintiff has knowingly initiated, permitted and acquiesced in special sales at substantially reduced prices, discounts, allowances and concessions by others in the retail sale of "Rubbermaid" products.

R. C. 1333.29 authorizes price changes in these words—

> Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price.

The plaintiff announces its permanent price revisions in several ways. The basic list of stipulated prices is Schedule A of the Rubbermaid Fair Trade Agreement. A revised Schedule A is mailed annually to each Rubbermaid retail dealer effective January 2nd. Also sent to all retail dealers and to its other accounts is the attractively colored and illustrated Catalog-Price List issued annually. This publication includes Company item number, picture, and description of each item, together with the current revised price list. An up-to-date price list is also separately published twice a year. Both the Catalog-Price List and the Price List state that prices are subject to change and that the listed products are fair traded in states having Fair-Trade statutes in effect.

During the course of the year Catalog Supplements are issued and distributed. Expressly amending revised Schedule A the Supplements list any new products, price reductions and discontinued items. Though not explained in the Supplements, the evidence developed that discontinued items are freed from stipulated price restrictions. To aid in merchandising discontinued items the retailer may sell these items at any price. A marketing necessity, this departure from minimum resale price maintainence illustrates that absolute price fixing is a merchandising impossibility. Nevertheless it shows no intent to abandon the fair trade program.

It is the special or promotional sales, conducted once or twice a year, which defendant claims represents an abandonment of plaintiff's fair trade price program.

With approximately four items involved in the sales, the number of sales items, in and of itself, is not a substantial part of the approximately 100 fair traded Rubbermaid Houseware products. In addition, the limitation of the price reduction to a fixed and limited period of sixty days evidences an intent to maintain and only to temporarily reduce the stipulated minimum resale prices.

Defendant's objection if correctly understood, goes to the size of the price reductions, and to the announcement of comparative old and new prices to gain maximum consumer attention and acceptance. Thus in the 1964 Fall Sale one Rubbermaid promotional flyer declared "Rubbermaid Dishpans $1.57 Regularly $1.98—Priced to Build Traffic at Full Profit." Another brochure proclaimed "Retails Reduced Up to 25% on Aluminum Top Counter Mats." A bulletin to all Rubbermaid Houseware Salesmen in July 1964 added Wastebaskets as a fall special. News of the one-third reduction in retail prices climaxes the sales appeal,

We're a sneaky bunch at Rubbermaid * * * I'd like to tell you about a 'Housewares Show Special' we're unveiling * * * to the amazement of our friends and customers (and the consternation of our enemies and competitors).

We've taken the four top selling Rubbermaid Rectangular Wastebaskets

* * * picked the fastest selling colors

* * * packed the entire assortment in *one* shipping carton

* * * picked the peak fall selling period

* * * REDUCED RETAIL PRICES BY ONE-THIRD.

The evidence reveals that the promotional sale price reductions and for that matter all other price reductions are brought to the customer's attention through various marketing techniques. Specially printed stickers attached to the container declare 1/3 OFF—Reg. Price $1.49—Now 99¢. A Safti-Grip Bathtub Mat Box bearing the printed price of $3.98 carries a sticker—PRICE REDUCED—NOW $3.49. Where stickers are not available a line may be drawn through the old price with the new price written in below, to emphasize comparison prices. Reported were numerous instances of Rubbermaid products on display in Cleveland's large department stores with markdowns of this type.

Department Store newspaper and direct mail advertisements of the 1964 Fall Sale specials further illustrate the same deliberate appeal to the bargain hunting consumer. One ad stated—1/3 OFF RUBBERMAID SPECIALTIES. The products featured were Wastebaskets and Storage Turn-Tables. A direct-mail booklet among many products of different manufacturers included Rubbermaid aluminum—top stove and counter mats—25% off.

One of plaintiff's witnesses was asked about a drain board mat, on which the printed price of $1.50 was scratched and $1.29 written thereunder. He answered,

> Since the purpose of reduction in the retail price is to make it available to the consumer at the new retail price, we welcome anything that can be done to tell the consumer * * * that she can now buy it at the new retail price of $1.29.

Asked whether by seasonal promotions it was hoped to improve consumer acceptance of Rubbermaid products he answered,

> This is only one of the purposes or reasons * * *. It is general practice in the business, in the trade, to have seasonal promotions and as one of the major manufacturers of housewares we are of course expected by our customers to also have seasonal promotions.

This sampling of the evidence shows; and it is found, that the comparative pricing marketing policy and practice of Rubbermaid is designed and serves to whet customer demand and retailer enthusiasm. It helps Rubbermaid and its retailers meet the competition of manufacturers of comparable brand name products. It fosters plaintiff's "free and open competition with commodities of the same general class produced by others."

Defendant's main point in this affirmative defense will be paraphrased. One of the legislative purposes of the fair trade law is to safeguard the good will attached to the proprietary interest in trade-marked products. If Uncle Bill's price reductions of trade-marked fair traded products is said to adversely affect Rubbermaid's good will, defendant argues that Rubbermaid's special sales at substantially reduced prices, and Rubbermaid's comparative pricing policy and practice similarly adversely affect Rub-

bermaid's good will. By this adverse effect, it is claimed Rubbermaid's Special Sales and comparative pricing work an abandonment of its minimum retail resale price maintenance.

When able to buy Rubbermaid's products from a wholesaler Uncle Bill's purchase price is forty percent off list (the same as retail hardware and houseware dealers). It sells Rubbermaid products approximately one-third off list (minimum retail resale price). On the average it reports its mark-up is 22 to 25 percent above cost; and that this reduced mark-up is made possible by self service merchandising and other low overhead expense. Actually it appears that Uncle Bill's is selling Rubbermaid products at only ten percent above its cost. For one-third off list is 66¢ on a dollar item. The selling price of 66¢ is but ten percent above its 60¢ cost (forty percent off one dollar list).

Selling Rubbermaid products at a mark-up of only ten percent, substantially below its average 22 to 25 percent mark-up, justifies the finding, now made, that Uncle Bill's is pricing Rubbermaid's quality products to attract customers. This pricing may be termed a reduced-price-leader. Yet it is not the fair-trade item loss leader tactic attributed to discount stores by the *Hudson* finding (174 Ohio St., at page 494).

> When * * * the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store * * *.

Comparable to defendant's regular one-third reductions plaintiff's 1964 fall specials had price reductions varying from a minimum of 21% to a maximum of 37%. Wastebaskets were reduced one-third, and Storage Turn-Tables 37%. Drainboard Mats, Stove 'n Counter Mats, and Dishpan mark-downs ranged between 21% and 25%.

Plaintiff's witnesses insist that if Rubbermaid institutes the price changes, if the price changes are made in the context of frequency and items involved, and if the price changes are available to all retailers Rubbermaid's good will is not adversely affected. However they insist that any unilateral price change by a single Rubbermaid dealer alone adversely affects good will.

The weight to be given this evidence depends on whose good will is in question. The good will of the retail dealers of Rubbermaid products is undoubtedly furthered by the maintenance of minimum retail resale prices. Likewise when a price reduction in stipulated prices is sponsored by Rubbermaid and made available to all retail dealers their good will for Rubbermaid is fostered. Conversely when a single retailer succeeds in selling Rubbermaid fair trade products below stipulated prices Rubbermaid good will in the minds of Rubbermaid retailers is damaged and impaired.

R. C. 1333.31 of the Fair Trade Act grants a proprietor a retention of a proprietary interest in his trademarked products, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Hudson makes it plain that the good will which the Act seeks to protect is consumer good will (demand). Thus it finds (174 Ohio St., at page 495):

> The majority of present-day consumer purchasing is by brand name. Today the public demand necessary for retail selling is created to a great extent not by the retailer but by the manufacturer, the owner of the trademark * * *. The value of any trademark is, of course, the demand for the product which it represents * * *.

As far as consumer good will (demand) is concerned, the plaintiff spends a great deal each year to maintain this. Of its 1964 estimated advertising expenditures $36,000 went to trade advertising while $512,600 went to consumer advertising; and of the $888,820 estimated as Rubbermaid's 1964 sales promotion expenditures, $448,500 was for co-op merchandising allowances (department store advertising reimbursement).

However, there is nothing in this record which supports the factual assumption of *Hudson* (174 Ohio St., at page 495):

> The continued discount selling of a trade-marked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise.

There is nothing to indicate that Uncle Bill's sale of Rubbermaid products at one-third off list price has cheapened Rubbermaid in the eyes of the purchasing public. On the contrary it is quite clear in the record that the Rubbermaid trade-mark and trade name remain synonymous with quality. Human nature, being what it is, a consumer wants Rubbermaid quality at the lowest price. Illustratively, a Rubbermaid witness was asked, "When people learn prices are reduced would that affect good will?" He honestly answered, "* * * when we generally reduce a price, we hope the consumer will say, 'Gee, that's wonderful, now I can afford this item, maybe.' "

Upon the evidence it is determined that consumer good will (demand) for Rubbermaid products is not impaired by reductions below previous fair-traded prices. Accordingly it is found that consumer good will for Rubbermaid is not adversely affected or disadvantaged by

price reductions on Rubbermaid's fair trade products, whether Rubbermaid or Uncle Bill's reduces the prices. Consumer good will not being harmed thereby plaintiff's price policies and practices cannot and do not abandon its minimum price maintenance.

The authority under R. C. 1333.29 to change stipulated minimum resale prices "from time to time" is broad enough to include the right to set temporary minimum resale prices during special sales. The statute however requires that the change be accomplished by "written notice" to the proprietor's distributors. What does "written notice" mean?

Section 1333.28(J) of the Revised Code defines notice as actual notice by any method provided by R. C. 1333.30. Actual notice however must be "written notice." It therefore cannot be oral, and it cannot be by advertising. The proprietor may give the notice of price changes by mail to each distributor. Or if the price change is clearly marked on the merchandise the statute specifies that this "shall be conclusive evidence of actual notice of such minimum resale prices."

Judge Griffith in *Hudson Distributors v. Upjohn Co., supra* (174 Ohio St. 487), at page 496 says,

> Here we have the producer of a commodity * * * fixing the price only of his own commodity.

This is nonetheless a unilateral power, even if by contract, express or implied, the distributor has assented to the proprietor's right to fix prices. As Judge Leach said in *Bulova Watch Co. v. Ontario Stores, supra,*

> * * * the question of whether minimum resale prices shall be established, whether, if established, they shall continue, the amount of such prices and the changing of such amount from time to time are all delegated to private persons to be exercised in their uncontrolled

discretion without any legislative standards or criteria.

Indispensable to the exercise of a power of this magnitude, whether it involves stipulating prices originally, or in making later price changes, written notice of any price change must be given equally and without discrimination to all distributors.

Applying these conclusions R. C. 1333.29 is construed to require Rubbermaid, in writing, to directly notify all its retail distributors in the same manner and at the same time. Actual written notice has been directly given to Rubbermaid wholesalers and all of its direct retail customers. With the use of flyers distributed by its wholesalers notice of price changes in special sales have been given its retail hardware and houseware dealers. There is no evidence that any retail dealer failed to get notice of the special sale price changes.

In this state of the record prior non-compliance with "written notice" of special sale price changes, insofar as the retail hardware and houseware dealers are concerned, cannot prevent plaintiff's request for injunctive relief. Nevertheless prospective operation of the order hereafter issued will be conditioned upon future notice of price changes being given to all retailers, directly and in writing.

The defendant further claims that the plaintiff has abandoned its price maintenance program through the manufacture and sale of "a bath mat which does not have a minimum stipulated resale price but which is identical in all respects with one which has, except only the imprint of the Rubbermaid name on the product." The plaintiff rightly insists that there is no compulsion to fair trade all of its houseware products. It insists further that the mat's difference in quality explains the lower price of the non-fair traded bathtub mat.

Since evidence in support of this claim has been received without objection, and the point has been fully argued, it will be ruled on, even though there is no affirmative defense which clearly covers this claim.

The bathtub mats in question are the fair traded Item No. DO 7038, and the non-fair traded Item No. DO 0450.

Both mats are 14 inches by 22½ inches in size. Both mats bear imprints of U. S. Patent No. 191,901. To the untrained eye there is no great difference in the quality of the rubber in each; but Item No. 7038 does have many more suction cups than Item No. 0450. By actual count Item No. 0450 has 288, while Item No. 7038, by estimate, has 526.

Item No. 7038, the fair-traded bathtub mat is packaged in a box labeled Rubbermaid Safti-Grip Bathtub mat, and bears the Rubbermaid trade-mark imprinted on the mat. Item No. 0450, the non fair-traded bathtub mat which sells for 80¢ less, is packaged in cellophane. Inside is a visible litho label, which at the top reads Safti-Grip Bathtub Mat; and the label at the bottom bears the Rubbermaid trade-mark.

Upon this evidence it is determined that a consumer may confuse non-fair-traded Item No. 0450, a Safti-Grip Bathtub Mat, with the same sized Safti-Grip Item No. 7038, a fair-traded bathtub mat. Admittedly Item No. 0450 is a promotional item. A cheaper bathtub mat, it may easily be mistaken by the consumer for the Safti-Grip Bathtub Mat, Item No. 7038, which apparently is of better quality. Neither packaging nor labeling informs the consumer which item is fair traded, and which is not fair traded.

Insofar as Item No. 7038 is concerned, as in *Krupsaw v. Luskin*, 1956 Trade Cases 68,288, "* * * the public is permitted to believe, albeit erroneously, that it can buy

the same kind of articles at substantially lower prices." It is therefore determined that the manufacturing and sale of Item No. 0450 effects an abandonment of the minimum resale price on Item No. 7038.

The claim of the defendant being sustained as to Safti-Grip Bathtub Mat, Item No. DO 7038, this particular item will be excepted from the effect and application of the injunctive order hereafter issued.

Finally to be considered is the affirmative defense which defendant designates Fourth Defense. It reads—

> During all times herein concerned, plaintiff has had in effect a system of pricing its "Rubbermaid" products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance.

Previously no unlawful discrimination was found to exist in minimum resale prices at the various levels of distribution. The present claim is something else. Here it is claimed discriminatory price discounts by way of demonstrator and advertising allowances favor certain retailers and classes of retailers.

For each class or level of distributor this is the Rubbermaid price structure. The wholesalers purchase from Rubbermaid rubber and wire houseware products at list (minimum retail resale prices) less 50% and 4%; and plastic houseware products at list less 50% and 10%. (Whenever two percentages are combined the second is a percentage of the first.) Rubbermaid's agreements with its wholesalers stipulate minimum resale prices to the retail hardware and houseware dealers at list price less 40%.

Rubbermaid sells direct to several classes of retail dealers. It sells direct to variety chains at 40% and 5% off list; and to premium accounts (said to approximate wholesalers but not otherwise described in the evidence) at 50% and 6% off list.

Rubbermaid also sells direct to department stores. Asked what is meant by the term department store it answers—we mean traditional department store. No more specific definition is suggested. Department stores buy from Rubbermaid at 40% and 5% off list. However if the department store contracts with Rubbermaid for its demonstrator program (now known as the retail representative program) and agrees to the terms and conditions of participation the department store buys from Rubbermaid at 40% off list (without the added 5% off).

Every $6,000 in Rubbermaid purchases during the preceding year qualifies a department store for a one-quarter demonstrator unit. At $12,000 in Rubbermaid purchases the department store would be eligible for a one-half unit; and so on. Thus at $24,000, a full unit would be available (one demonstrator) and at $30,000 one and one-quarter units would be available.

The wages of a demonstrator, varying between $50 and $57 a week, are either paid direct by Rubbermaid or if paid by the department store are reimbursed by Rubbermaid. A full time demonstrator is expected to devote all her time to Rubbermaid sales and promotions.

The dollar value of the demonstrator program is computable. Purchases from Rubbermaid of $24,000 represents $40,000 (list price) less 40% or $16,000. At $55 a week the demonstrator's annual salary of $2860 represents almost 18% of the $16,000. Hence 40% and 18% off list produces a lower price (and probably an increase in business) contrasted with the 40% and 5% off list price

at which the direct retail dealer (department store) buys who does not participate in the demonstrator program.

The demonstrator program, with its promotion and increased sale of Rubbermaid products, is advantageous to Rubbermaid. The participating department stores stock all or most of Rubbermaid's entire line of housewares. Their displays are extensive. Their customers represent a large and receptive consumer market. Adequate consideration existing for the demonstrator allowances, the allowances are determined not to be price cuts in disguise. Moreover the demonstrator allowances are held not to be deliberately discriminatory nor intentionally harmful to the defendant.

A similar conclusion is reached concerning the 3% cooperative merchandising allowance which reimburses department store advertising of Rubbermaid products for media expense actually incurred. Here too an obvious promotional advantage redounds to Rubbermaid. Payment for this consideration, undoubtedly valuable to Rubbermaid, fails to prove the defense claimed.

A related but different question is whether, as a prerequisite to granting of injunctive relief, this Court has the power and the duty to require the plaintiff to remove all financial preferences from its price structure. Should the plaintiff, in granting demonstrator and advertising allowances, be compelled to scuttle its vague department store classification and permit any retailer to participate when it reaches $6,000 (one-fourth demonstrator unit) in Rubbermaid purchases? Should the plaintiff be required to make the 3% co-op merchandinsing allowance (now available to department stores) also available to its wholesalers? Increase of the present 2% allowance by one percent could be used by the wholesalers to directly advertise Rubbermaid products for the wholesalers' hard-

ware and houseware retailers. This would clearly aid these small retailers more than the department store advertising of Rubbermaid products, from which plaintiff's witnesses insist the small retailer derives a vicarious benefit.

The only small retailer who appeared as a witness testified that customers, seeing his regular Rubbermaid prices, leave his hardware store without buying. Undoubtedly he attributes this to Uncle Bill's reduced price of Rubbermaid products, even though offers to prove this point were ruled inadmissible. Protection of the small retailer from discount retailing below fair trade prices is within the legislative purpose of the Act "to protect and preserve small business." To achieve the same legislative purpose may Equity require the proprietor to extend its pricing and allowance advantages equally to small and large retailers alike?

Everything considered, the power to balance the equities is deemed not broad enough to permit this Court to so regulate the plaintiff's manner of doing business.

Within the context of this case an equitable defense must relate to a proprietor's conduct which either violates the 1959 Fair Trade Act, or is inconsistent with the maintenance of plaintiff's minimum retail resale prices. Applying this test, the Fourth Defense, under the evidence, is not sustained.

The Fifth and Sixth Defenses have each been previously stricken as a matter of law.

Upon the whole record an injunction will be granted in favor of the plaintiff and against the defendant, to enjoin the defendant from selling, offering for sale or advertising for sale any product manufactured by plaintiff and bearing plaintiff's trade-marks, brands, names or labels, at prices less than the minimum retail resale prices now

or hereafter established by plaintiff pursuant to its fair trade agreements and contracts, but said injunction shall be conditioned upon the following terms:

1. The injunction shall become effective thirty days from the date of the Journal Entry, unless at a hearing to be held, if necessary, five days prior to the effective date the defendant establishes that the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesday on the cash purchases of Rubbermaid fair traded products has not ceased.

2. The plaintiff shall hereafter give direct written notice to each Ohio retailer of Rubbermaid fair traded products of any price revision or change, whether made in connection with a special sale or otherwise.

3. Excepted from this order is Safti-Grip Bathtub Mat, Item No. DO 7038.

4. The question of damages is reserved.

5. This order is subject to the further order of this Court.

WILLIAM K. THOMAS,
Judge.

OPINION OF THE COURT OF COMMON PLEAS.

(May 12, 1965.)

WILLIAM K. THOMAS, J.:

Defendant Claber Distributing Co. of Cleveland, Ohio, Inc. (Uncle Bill's), moves to dismiss plaintiff Rubbermaid, Inc.'s application for an order requiring Uncle Bill's to pay the attorney fees of Rubbermaid's counsel in this litigation.

In the March 5, 1965 decision of this court granting Rubbermaid a conditional injunction against Uncle Bill's sale of Rubbermaid's fair-traded products at prices less

than Rubbermaid's minimum retail resale prices, the question of damages was reserved. Subsequently a hearing was held to receive proof of any claimed damages. Rubbermaid relinquished its claim of damages, but made application for an order to require Uncle Bill's to pay Rubbermaid's attorney fees incurred in this litigation.

Rubbermaid's application for the payment of its attorney fees is made pursuant to Revised Code Sec. 1333.32 (B) which reads:

> Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> (1) Recover the amount of damages sustained as a result thereof;
>
> (2) Obtain injunctive relief whether or not specific monetary damages are established;
>
> (3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

In support of its motion to dismiss Rubbermaid's application Uncle Bill's urges that "the statute (Sec. 1333.32 (B) (3)) which undertakes to permit the inclusion of attorneys' fees as part of the court costs is unconstitutional in that it denies this defendant due process and equal protection of the law, and further (2) that even if the statute were valid attorneys' fees should not be allowed to the plaintiff in this case."

"The general rule in Ohio is that, in the absence of a statutory provision making attorney fees a part of the costs, such fees cannot be so taxed," *State ex rel. v. Morse*, 165 Ohio St. 599 at 607. In stating that "costs of suit (including reasonable attorney fees)" may be recovered, Re-

vised Code Sec. 1333.32 (B) (3), consistent with the general rule, provides that attorney fees may be taxed as part of the costs. The provision, however, authorizes reasonable attorney fees only in favor of a prevailing petitioner under the 1959 Ohio Fair Trade Act. It is on this one-sided quality of the Act that the defendant centers its constitutional attack. Mindful of the "judicial obligation to support the enactment of a law-making body if this can be done," 10 *O. Jur.* 2d 240, Constitutional Law, Sec. 162, the meaning and effect of Revised Code Sec. 1333.32 (B) (3) will be analyzed.

Revised Code Sec. 1333.32 (B) lists three possible items of recovery.

The first is damages.

The second is injunctive relief.

The third is costs of suit, including reasonable attorney fees.

The section states that "costs and attorney fees may be recovered whether or not specific monetary damages are established." However, court costs (including attorney fees) are not an independent item of relief. Court costs (including attorney fees) must be incidental to the recovery of monetary damages or injunctive relief or both. Yet if damages or injunctive relief are recovered it does not follow that court costs and attorney fees must be taxed.

In providing that "costs and attorney fees may be recovered," Revised Code Sec. 1333.32 (B) (3) manifests an intention to make discretionary the incidental taxing of costs and attorney fees. Wholly absent is mandatory language, such as appears in Revised Code Sec. 4123.51.9, under the Workmen's Compensation Act, which states, "The cost of any legal proceedings * * * including an attorney's fee to the claimant's attorney to be fixed by the trial judge in the event the claimant's right to participate * * * in the

fund is established * * * shall be taxed against the employer or the industrial commission." Fairly construed, Revised Code Sec. 1333.32 (B) (3) is deemed to vest the trial judge with discretion as to whether or not costs and attorney fees shall be recovered by a party who secures relief under the 1959 Fair Trade Act of Ohio (Revised Code Sec. 1333.27-1333.34).

In exercising judicial discretion as to whether or not court costs and attorney fees should be taxed, this cannot mean that the trial judge must award court costs and attorney fees to every party who secures relief under the Act. If that were so, the judge is not vested with judicial discretion.

What then is the criterion which should govern the exercise of judicial discretion in awarding costs and reasonable attorney fees. In equitable proceedings "the allowance and apportionment of costs has always rested in the sound discretion of the court," 14 *O. Jur.* 2d, p. 16, Costs, Sec. 16. Revised Code Sec. 2323.44 codifies this principle. This principle of sound discretion offers a general guide, but a more definite criterion is needed.

Elaboration of the guide of sound discretion in awarding attorney fees is available in the judicial construction of Title 35, U. S. C. A. Sec. 70. Prior to the 1952 revision it provided that "The Court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case." Concerning this language *Turchan v. Cincinnati Milling Machine Co.*, 208 F. 2d 229 (6th Circ. 1953) declares:

> It has been held that under this section such fees are not to be allowed as a matter of course for Congress did not intend recovery of attorney fees to become the usual thing in patent cases, that the section commits the matter to the discretion of the District Court, that

> the criterion for its exercise is bad faith of the unsuccessful party and the reviewing court will not interfere unless there has been an abuse of discretion amounting to caprice or an erroneous conception of law.

Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d 731, points out that:

> Under 35 U. S. C. A. Sec. 285 'the court in exceptional cases may award reasonable attorney fees to the prevailing party.' This section enacted in 1952 adopted the language of the repealed 35 U. S. C. A. Sec. 70, except that the wording 'exceptional cases' was substituted for 'in its (the court's) discretion.' This change was explained by the revisors as merely expressing the intent of 35 U. S. C. A. Sec. 70, as shown by its legislative history and as interpreted by the courts.

The Court of Appeals for the Ninth Circuit further ruled:

> * * * Here the trial court's findings of fact that the action was brought by Talon without sufficient investigation, in bad faith, without reasonable belief in the validity of the patents, and that the litigation proves harassment and misconduct on the part of Talon, are all clearly supported by the record. We hold that the trial court did not abuse its discretion in awarding attorney's fees to Union.

Even in the absence of a statute permitting attorney fees in trademark infringement and unfair competitive cases, "the lower federal courts, as a part of their historic equity jurisdiction, grant attorneys' fees in such cases as compensatory damages and not as costs against a party guilty of fraud, bad faith, or other unconscionable conduct." Annotation, 8 L. Ed. 2d 894 at 914.

In determining whether or not attorney fees should be taxed in favor of a party who secures relief under the Ohio

Fair Trade Act the trial judge should exercise his sound discretion. In exercising his sound discretion the trial judge should appraise the conduct of the party against whom monetary damages or injunctive relief is recovered. If bad faith, by sham or vexatious defenses, or other unconscionable conduct, marks the actions of the party against whom relief is recovered, then reasonable attorney fees should be taxed against such party in favor of the prevailing party.

This construction of Revised Code Sec. 1333.32 (B) (3) differs from the categorical grant of attorney fees provided solely to claimant's attorneys in the statute struck down in *Coal Company v. Rosser*, 58 Ohio St. 12. Presently relevant is the Supreme Court's observation in *Rosser* that "Under these circumstances no intent to vex, or harass the claimant, or delay the action, can be imputed to the plaintiff in error."

Defendant urges invalidity of Revised Code Sec. 1333.32 (B) (3) on the ground that it denies due process and equal protection of the law. In *Gomes v. Bristol Manufacturing Corporation*, 184 A. 2d 787 (1962), the Rhode Island Supreme Court upheld the constitutionality of the provision of the Rhode Island Workmen's Compensation Act, which like the Ohio law, allows costs and reasonable attorney fees to be taxed against an unsuccessful employer, while not extending the same right to a successful employer against a losing employee. It held, "this is not an improper classification."

Litigation is the method prescribed by the Legislature to enforce the provision said to be the core of the 1959 Ohio Fair Trade Act. *Hudson Distributors v. Upjohn Co.*, 174 Ohio St. at 491 says:

> This provision is the core of the act. When read in conjunction with the rest of the act, it provides in

> essence that, when a retailer with notice that an item had been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.

The Legislature may seek to facilitate the purposes and enforce the central provision of the Act by taxing reasonable attorney fees against defendants who are guilty of bad faith in resisting the litigation. Treating defendants differently from plaintiffs as well as from each other, depending on the good faith or bad faith of their conduct in resisting litigation is a reasonable classification.

Moreover, any reasonable attorney fees recovered under Revised Code Sec. 1333.32 (B) (3) would not represent a penalty. Instead they would be taxed as a form of costs within the definition of costs given in *Symons v. Eichelberger*, 110 Ohio St. 224, at 238:

> Costs are not at the present time considered as punishment. The modern theory is that costs are allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court.

The foregoing conclusions of law will be applied to Uncle Bill's motion to dismiss Rubbermaid's application for reasonable attorney fees. In the exercise of sound discretion, this court must determine whether or not Uncle Bill's conduct in this litigation has been marked with good or bad faith.

Uncle Bill's throughout this litigation has urged the unconstitutionality of the 1959 Ohio Fair Trade Act. Bearing in mind that in *Hudson, supra*, four out of seven judges

of the Ohio Supreme Court held the Act was unconstitutional, it cannot be found that Uncle Bill's continuing challenge of the Act's constitutionality evidences bad faith.

Uncle Bill's has asserted several equitable defenses. Some of these have been overruled. Several have been sustained, and are reflected in the conditional nature of the injunction which the court has ordered. Thus the terms of the proposed order provide, in part:

> 1. The injunction shall become effective thirty days from the date of the Journal Entry, unless at a hearing to be held, if necessary, five days prior to the effective date the defendant establishes that the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesday on the cash purchases of Rubbermaid fair-traded products has not ceased.

These several defenses, asserted by Uncle Bill's, are neither sham nor vexatious, nor unconscionable. Uncle Bill's, through its attorneys, has fought hard but with good faith in opposing the Act and this litigation brought under the Act.

Absent a finding of bad faith in Uncle Bill's conduct in this litigation, plaintiff Rubbermaid's application for an order directing Uncle Bill's to pay its reasonable attorney fees is dismissed.

WILLIAM K. THOMAS,
Judge.

ORAL OPINION OF THE COURT OF COMMON PLEAS.

(July 22, 1965.)

WILLIAM K. THOMAS, J.

(34) The Court: Gentlemen, I want to say at the outset, as I listened, as I listened to counsel for Rubbermaid is presenting its application here asking the Court to alter certain original conclusions and findings, among other things, that I am certainly struck with your complete sincerity in these matters. I must, of course, bear that in mind and I must also bear in mind the issue that has now been before me since some several months ago on March 5 when I rendered my original opinion. On the 24th of May, 1965, I signed the journal entry in this case. Paragraph 3 of the journal entry reads as follows:

> "This injunction shall become effective thirty (30) days from the date of this journal entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesdays on the cash purchase of Rubbermaid fair-traded products has not ceased."

This finding and conclusion of the Court is, of course, predicated on the conclusions and findings contained in the Opinion of March 5 as it relates to the practice of The May Company which is described in the third paragraph of the journal entry of May 24.

On pages 9 and 10 of that Opinion I made (35) certain observations and findings concerning this practice and I concluded with this sentence:

> "Old as is The May Company's sixty-year practice of giving Double Eagle Stamps on Tuesday, its venerability does not put the custom beyond the reach of

the plain and positive three per cent trading stamp limitation of R. C. 1333.32."

I went on to say further:

"Defendant proves Rubbermaid's lack of diligent enforcement of its minimum price maintenance program, in knowingly permitting May's Double Eagle Stamps on Tuesday to be given on Rubbermaid cash purchases."

I have examined the record in front of me and I find no basis for altering my conclusions reached there. At this time I reaffirm the conclusions stated in my Opinion and the finding contained in paragraph 3 of the journal entry of May 24 as to the substantive question.

We move now then to the procedural aspects of this proceeding. On that very same day, May 24, we had a hearing with counsel present, and, among other things, the question of burden of proof in this subsequent hearing arose. At that time the following statements were made in part by the Court:

"I have further said that in the event of a further hearing in this case with reference to the matters covered by paragraph 3 of the journal entry, that I will assume that those matters I have previously found to exist at the time of (36) my written Opinion are continuing unless shown to the contrary."

And now I interpolate the fact that I now have in front of me the positive statement that these conditions are continuing.

Now, continuing to read from the proceedings of May 24:

"However, it is my understanding of the law and it is the position of the Court that the matters set forth in paragraph 3 relate to the affirmative defense asserted by defendant Uncle Bill's. Accordingly, the

burden of proof rests upon Uncle Bill's in this respect. Nevertheless, because of the assumption previously made about continuing conditions, it is my thought that the practice of giving Double Eagle Stamps on Tuesday on the purchase of Rubbermaid fair-traded products, if shown to be still continuing, would meet prima-facie, at least, the burden of proof and would require Rubbermaid to go forward to overcome or rebut the showing of such prima-facie proof."

We have now a positive finding that this practice has continued and, therefore, the prima-facie condition described here certainly arises.

And then I went on to make this statement:

"There are some other statements made, and I have indicated that I certainly would not assume that a letter of Rubbermaid directing The May Company to cease and desist standing alone would be sufficient. I would certainly have to consider the whole thing in the context of the contract under which Rubbermaid and The May Company have been carrying on their relationship with reference to all other matters."

(37) Now, proceeding then to the hearing of June 17, at the conclusion of the exchange that occurred there, Mr. McClatchey made a statement along these lines—not along these lines—but quoted verbatim:

"Your Honor, the day before we filed the suit I called Mr. Wellman, counsel for The May Company, and said, 'If we do not obtain the injunction, we are going to cut you off. If we do obtain the injunction and you decide to cut us off, there is no sense in our filing the lawsuit.' "

"He said,"—that would be Mr. Wellman— 'Unless I call you, file your lawsuit.' He never called me; and I assume that if we obtain the injunction they will comply. He reaffirmed that position in Judge Connell's chambers."

"The Court: It sums up to this, if Judge Connell grants the injunction, The May Company will comply; and if Judge Connell refuses, you will cut off."

The record shows before me that Judge Connell has refused the injunction, but that Rubbermaid has not terminated its contract with The May Company. It seems to me, gentlemen, that this matter has now proceeded to the point where a definitive ruling must be made by this Court.

In addition to the matters alluded to in my Opinion which, it seemed to me, give certain built-in enforcement powers, and which, it seems to me, there is no evidence that they have used or utilized, (38) there is the further fact that as early as May 24 I brought up the matters of the contract; and I have before me the clear representation of counsel for Rubbermaid that it would terminate the contract as of any time that Judge Connell would refuse the injunction.

Now, I certainly don't raise that in terms of them changing their position. I realize you are now confronted with a different problem. However, I am not confronted with a different problem. I am still confronted with the same problem that faced me on March 5, on May 24 and on June 17. It is my considered judgment that Rubbermaid has not shown the necessary diligence in that they have not terminated the contract with May Company and they have not exercised the built-in enforcement powers to which reference was made in the Opinion.

Accordingly, after due consideration, the Court feels compelled to and does at this time cancel the conditional injunction previously ordered by this Court. A journal entry may be prepared so that this is clear, and in the final order there will be no question but there shall be a full right of appeal from this judgment.

COURT OF APPEALS' MEMORANDUM TO LAWYERS.

(Dated April 25, 1967.)

In this action plaintiff sought (a) an injunction against the defendant selling plaintiff's fair traded products at prices approximately 33⅓% below plaintiff's fair trade prices and (b) statutory attorney fees.

Following trial, the trial court found that plaintiff had established all elements of its prima facie case. For the purpose of this memorandum, it will not be necessary to set out at length the findings of the court, since counsel are familiar with them.

The trial court found that the plaintiff was entitled to a permanent injunction against defendant further selling of plaintiff's fair traded products below plaintiff's fair trade prices unless defendant established one of its affirmative defenses.

All affirmative defenses, save one, were rejected by the court. The only basis upon which the court denied a permanent injunction to plaintiff was its holding that plaintiff had not diligently and fairly enforced its fair trade program.

In so holding, the trial court found:

(a) that the practice of The May Company in giving one additional trading stamp per 10 cents on cash purchases of plaintiff's fair traded products on Tuesday was a violation of the Ohio Fair Trade Law, and

(b) that The May Company's "double stamp" practice constituted a bar to the enforcement of plaintiff's fair trade program against the defendant.

On the question as to whether or not the practice of The May Company giving double stamps for cash purchases on Tuesday of each week, which applies to the cash

purchase of any item in its stores including plaintiff's products, constitutes a violation of the fair trade law, the question was at issue in an earlier unreported case in the Court of Common Pleas, No. 795,634, *John P. Sedlak, Inc. vs. The Magnavox Co.*, wherein the trial court there rejected the defense that The May Company's practice violated the Ohio Fair Trade Law.

Following the trial court's ruling in the instant case, but prior to finally denying the injunctive relief sought, plaintiff filed a fair trade action in the Court of Common Pleas against The May Company seeking an injunction and attorney fees. The case was removed to Federal Court. It was there heard and decided. The court there denied plaintiff's prayer for injunctive relief against The May Company; the district court refused to follow the reasoning and holding of the trial court in this case that the double stamp practice was a violation of the fair trade law. That decision is presently pending on appeal in the Sixth Circuit Court of Appeals.

As long ago as 1942, with the decision of the California court in the case of *Weco Products Co. vs. Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684, and a line of similar decisions, the courts have held that giving trading stamps did not constitute a violation of the fair trade law.

The court in the instant case conditioned plaintiff's right to an injunction against the defendant upon the cessation of The May Company's practice. In effect, the court ruled that anything less than a cessation of The May Company's practice or a termination of plaintiff's contractual relation with The May Company would bar relief against defendant.

In reviewing the record in this case, it is apparent that the plaintiff has 1100 fair trade contracts in the State of Ohio and 150 in Cuyahoga County. With the exception

of the defendant in Cuyahoga County, and The May Company, in the holding of the trial court no one in the entire state sells plaintiff's fair traded products below fair trade prices. From an examination of the cases in other jurisdictions when violations had been claimed and disclosed, it strikes us that the enforcement of fair trade practices in Ohio by the plaintiff is practically perfect.

On examination of the authorities cited it is clear that the plaintiff's duty and obligation in enforcing its fair trade program is one of reasonable diligence. See, *Bulova Watch Co., Inc. vs. Klein on the Square, Inc.*, 1965 CCH Trade Cases No. 71,407 (N. Y. Sup. Ct. 1965); *General Electric Co. vs. R. H. Macy & Co.*, 1950-1951 Trade Cases No. 62,764; *National Distillers and Chemical Corp. vs. R. H. Macy & Co., Inc.*, 1965 CCH Trade Cases No. 71,423 (N. Y. App. Div. 1965), and cases cited therein; *Automotive Electric Service Corp. vs. Times Square Stores Corp.*, 175 Misc. 865, 24 N. Y. S. 2d 733 (N. Y. Sup. Ct. 1940).

A fair trader need not bring suit against every violator. See, *Revere Copper & Brass, Inc. vs. The Economy Sales Co.*, 127 F. Supp. 739 (D. Conn. 1954); *Shulton, Inc. v. 58 West 34th Street*, 1964 CCH Trade Cases No. 71,169 (N. Y. Sup. Ct. 1964).

It is interesting to note that fair trade injunctions have been granted in cases where there were four violators at the time the injunction was granted, *Lionel Corp. vs. Klein*, 1955 CCH Trade Cases, No. 68,085 (Del. Ch. Ct. 1955); where there were seven violators, *Gillette Co. vs. G. E. M. of San Jose, Inc.*, 1962 CCH Trade Cases, No. 70,293 (Calif. Super. Ct. 1962), and where 2.2% of all retail outlets were found to be violators, *Dart Drug Corp. of Maryland vs. Eli Lilly & Co.*, 1958 CCH Trade Cases, No. 68,969 (Md. 1958).

In *General Electric Co. vs. Home Utilities Company, Inc.*, 1955 CCH Trade Cases No. 68,148 (D. Md. 1955), the federal district court found diligent enforcement, and granted a fair trade injunction, where there were sixty-nine violators out of one thousand retailers. In the present case, there is one violator out of eleven hundred retailers. Yet the trial court found lack of diligent enforcement on the basis of this one violation.

Notwithstanding that plaintiff herein sought an injunction against The May Company, as above noted, unsuccessfully, the court imposed its rather unique requirement that plaintiff be required to cancel its contract with The May Company. A review of the cases cited with respect to that problem indicates that no such requirement is necessary. See, *The Upjohn Company vs. Ace Prescription Center, Inc.*

The trial court held, however, that filing and prosecuting suit against The May Company was not enough. It refused to make the injunction absolute unless plaintiff terminated its contract with The May Company. In so holding, the trial court imposed a requirement that is unique in fair trade cases. No court has ever required a manufacturer to cancel its agreement with a retailer—particularly where the manufacturer has filed suit to enjoin the retailer—as a condition of obtaining relief in a fair trade case. On the contrary, the law is clear that a manufacturer is under no obligation to cancel its agreement with the retailer, particularly where demand has been made on the retailer, to comply with plaintiff's fair trade prices and a suit to enjoin the alleged price cutting has been filed. Thus, in *The Upjohn Company vs. Ace Prescription Center, Inc.*, 1964 CCH Trade Cases No. 71,142 (S. D. N. Y. 1964), the federal district court stated:

"It is clear under the New York cases that a manufacturer is under no obligation to stop selling to a price cutting retailer. The fact that the parties have continued to do business with each other during the pendency of the law suit is no ground for denying an injunction.

"Columbia Records v. Goody, 278 App. Div. 401 (1950-1951 Trade Cases No. 62,866) 105 N. Y. S. 2d 659 (1st Dept. 1951).

"General Electric Co. v. R. H. Macy & Co., 103 N. Y. S. 2d 440 (Sup. Ct. N. Y. Co. 1951).

"General Electric Co. v. S. Klein-on-the-Square (1963 Trade Cases No. 67,443) 121 N. Y. S. 2d 37 (Sup. Ct. N. Y. Co. 1953)."

The premise of the trial court's holding, that The May Company's practice barred relief against defendant, is that it is inequitable to require one retailer (the defendant) to observe plaintiff's fair trade prices when another retailer (The May Company) is permitted to "sell" below those prices. Yet the result of the trial court's reasoning is not to put all retailers on equal footing—because all eleven hundred retailers in Ohio (and 150 in this county) except defendant have agreed in writing to maintain plaintiff's fair trade prices—but rather to permit defendant to continue, willfully and flagrantly, to sell at 33⅓% below plaintiff's fair trade prices—far below the price at which the other retailers sell.

It is far more consistent with equitable principles to put defendant on an equal footing with all other retailers, including The May Company, by granting defendant the benefit of the cash discount provision of plaintiff's fair trade agreement, than to bar relief entirely against defendant's willful 33⅓% price cutting—to the continued prejudice of all other retailers of plaintiff's fair traded

products, and the ultimate destruction of plaintiff's fair trade program.

We therefore conclude and hold

(a) that The May Company's practice of giving one additional trading stamp per 10¢ on cash purchases on Tuesday does not violate the Ohio Fair Trade Law;

(b) that plaintiff's right to injunction against the defendant is not dependent upon plaintiff's termination of its contract with The May Company;

(c) that plaintiff's right to injunctive process against the defendant is dependent upon plaintiff's obligation to use reasonable diligence in enforcing its fair trade program and that in the instant case, its program of enforcement has met the standard of reasonable diligence.

We therefore conclude and hold that the trial court committed prejudicial error in refusing to grant plaintiff the injunctive relief it sought against the defendant.

It is our determination that the plaintiff herein, in addition to injunctive relief, is entitled to recover its reasonable attorney fees incurred in its action to enforce its fair trade program.

The judgment of the Court of Common Pleas is reversed for the reasons stated herein and the cause is remanded to said court with instructions to grant to plaintiff a permanent injunction as prayed for, and to determine a reasonable amount of attorney fees to which plaintiff is entitled.

Exceptions. Order see journal.

ARTL, C.J., CORRIGAN, J., and WASSERMAN, J. concur.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed May 24, 1967.)

This cause having come on for hearing as an appeal on questions of law upon the original papers, assignments of error, partial bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and the briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant in this, to wit: The Court of Common Pleas erred in denying plaintiff-appellant the injunctive relief it sought against the defendant-appellee; and erred in holding that plaintiff-appellant was not entitled to recover from defendant-appellee reasonable attorney fees as provided in section 1333.32(B), Ohio Revised Code.

IT IS THEREFORE CONSIDERED, ADJUDGED AND DECREED by this Court that the judgment of the Court of Common Pleas of Cuyahoga County (except for that part of the judgment contained in paragraph 2 of said Court's May 24, 1965 Journal Entry, no appeal having been taken from said paragraph 2), be and the same is hereby reversed and held for naught.

IT IS FURTHER ORDERED that this cause be remanded to the Court of Common Pleas of Cuyahoga County for the entry of a permanent injunction in accordance herewith and as prayed for by plaintiff-appellant, and for the determination of reasonable attorney fees to be allowed to plaintiff-appellant against defendant-appellee.

IT IS FURTHER ORDERED that plaintiff-appellant recover its court costs of defendant-appellee in this Court and in the Court of Common Pleas.

To all of which defendant-appellee excepts.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

(Entered November 1, 1967.)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

(Entered November 1, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

MANDATE OF THE SUPREME COURT OF OHIO.

(November 1, 1967.)

To the Honorable Common Pleas Court
Within and for the County of Cuyahoga, Ohio,
Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(Entered November 29, 1967.)

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE UNITED STATES SUPREME COURT EXTENDING TIME FOR DOCKETING.

(Entered February 27, 1968.)

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including April 12, 1968.

/s/ POTTER STEWART,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of February, 1968.

CONSTITUTION AND STATUTES.

Amendment [XIV] of the United States Constitution.

[RIGHTS OF CITIZENS.]

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(Act of June 19, 1936, Chap. 592, 49 Stat. 1526; 15 U. S. Code, Secs. 13, 13a, 13b, 21a.)

An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

§ 13(a) [Clayton Act] That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only

due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Payments for Services and Facilities Furnished by Customer—Advertising Allowances.]

§ 13(d) "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of

such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Furnishing Services or Facilities.]

§ 13(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Inducing or Receiving Discriminatory Price.]

§ 13(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

§ 1333.27 Purpose and policy.

(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifi-

cally granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through

their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

§ 1333.28 Definitions.

As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a

distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

§ 1333.29 Contracts or notices establishing minimum resale prices.

(A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in

the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquire such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

§ 1333.30 Evidence of notice.

Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may also be otherwise established by legally admissible evidence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

§ 1333.31 Retention of proprietary interests.

A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

§ 1333.32 Unfair competition; remedies.

(A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price at less than such stipulated minimum resale price, to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof,

or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor, provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

§ 1333.33 Exceptions.

It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove

that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trademark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

§ 1333.34 Exempt agreements.

Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.